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NOTES

Workers' Compensation: Temporary Employees and the Exclusiveness-of-Remedy Provision

BY BRIAN C. BAUGH*

INTRODUCTION

Two employees are working side by side on an assembly line located in a certain manufacturing plant. Employee number one is a permanent employee of the plant, while Employee number two is a contingent worker temporarily retained by the employer, or recipient company, from a temporary employment agency such as Manpower Temporary Services.¹ Employee number one is covered by the recipient company's workers' compensation carrier; Employee number two is covered under the temporary employment agency's workers' compensation carrier. Suddenly a conveyor belt snaps and both employees suffer injuries. Subsequently, it is learned that the cause of the accident may have been the recipient company's negligence in failing to properly maintain its equipment.

Employee number one's workers' compensation situation is typical and well settled in Kentucky. Because he is an employee of the compa-

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¹ See Carolyn Wiley, *A Comparison of Seven National Temporary and Staffing Agencies*, EMPLOYMENT RELATIONS TODAY, June 22, 1995, at 69, available in 1995 WL 12245761 (noting that "Manpower Temporary Services is currently the largest staffing service. It operates in 38 countries, employs more than 1.5 million people in 2,000 offices, and serves close to 400,000 customers around the world every year.").

ny,² he is entitled to workers' compensation benefits.³ This is, of course, a no-fault system, and in order to receive his benefits, Employee number one will not have to prove his employer was negligent.⁴ In return for this no-fault system of liability, section 342.690 of the Kentucky Revised Statutes ("K.R.S.") provides the employer with immunity from a common law action by the injured employee.⁵ In other words, if Employee number one has accepted workers' compensation coverage, K.R.S. § 342.690 precludes him from bringing a common law suit against his employer.⁶

Employee number two's situation is a little more complex. Who will be responsible for his or her injuries? Should Employee number two be treated as an employee of the manufacturing plant, or as an employee of the temporary employment agency? As noted above, Employee number one must choose, usually at the beginning of employment, between opting for workers' compensation coverage and electing to retain his or her rights to sue the employer.⁷ Should Employee number two have to make this choice as well, or should he or she be able to sue the manufacturing plant and draw workers' compensation payments from the temporary employment agency? Would such a system be a "windfall" for the temporary employee? Are Employee number one and Employee number two considered equally valuable employees outside the context of workers' compensation? Before the accident, were they treated the same? If workers' compensation is the temporary worker's only remedy, is the recipient company provided with adequate incentives to maintain a safe working environment?

² See KY. REV. STAT. ANN. [hereinafter "K.R.S."] § 342.640 (Michie 1997) (defining the numerous circumstances in which a worker is considered to be an "employee" under Kentucky's workers' compensation provisions).

³ See *id.* § 342.610 (providing that "[e]very employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury"); see also *id.* § 342.630 (defining what constitutes an "employer" for purposes of Kentucky's workers' compensation provisions).

⁴ See *id.* § 342.610.

⁵ See *id.* § 342.690. See *infra* note 41 for a discussion of this provision.

⁶ See K.R.S. § 342.690. Employee number one's situation is beyond the scope of this paper. The author assumes the reader is somewhat familiar with the workers' compensation scheme for typical employees.

⁷ See *id.* § 342.650 (stating that employees may elect to waive coverage under Kentucky's workers' compensation chapter).

In a typical leasing contract between a temporary employment agency and a recipient company, the temporary employment agency is responsible for providing the worker with workers' compensation coverage as well as a myriad of other employment services, such as Social Security benefits.⁸ Therefore, the law will usually make the employee look to the employment agency, rather than to the recipient company, for workers' compensation payments. The difficult question presented by this triangular relationship is whether the temporary worker is an "employee" of the recipient company. Will the temporary employee simply be treated as a regular employee for purposes of workers' compensation, and thus be precluded from lobbying a common law suit for damages against the recipient company?

The growth of contingent workers is testing traditional workers' compensation laws. Temporary employment agencies are transforming our perceptions of the typical employment relationship⁹ and challenging the legal understanding of what constitutes an employee/employer relationship. One thing is very clear: employer demands for contingent workers are on the rise, and this increasing demand will continue to be met by labor brokers such as Manpower, Inc.¹⁰ In light of the apparent demand that businesses have for contingent workers, the law in this area should be thoughtfully developed so as to strike an appropriate balance between the competing needs of a new, non-traditional workforce and companies that elect to utilize temporary workers.

The purpose of this Note is to examine this increasingly popular form of employment and its effect on the traditional workings of Kentucky's workers' compensation laws. Specifically, this Note examines whether an injured temporary employee retains his or her right to bring a common law action against the recipient company. Part I will discuss the impact the temporary employment relationship has had on the American workforce.¹¹ Part II will then trace Kentucky's limited judicial handling of the way Kentucky workers' compensation law deals with temporary

⁸ See Wiley, *supra* note 1.

⁹ See *infra* notes 15-36 (discussing how temporary employment is transforming the traditional workplace).

¹⁰ See Kenneth A. Jenero & Mark A. Spognardi, *Temporary Employment Relationships: Review of the Joint Employer Doctrine Under the NLRA (National Labor Relations Act)*, EMPLOYEE REL. L.J., Autumn 1995, at 127, 135 ("The trend toward the use of temporary employment relationships can be expected to continue as employers seek needed human resource flexibility and cost reductions to remain competitive."); see also Part I (*infra* notes 15-36).

¹¹ See *infra* notes 15-36 and accompanying text.

employees.¹² Part III will examine a different approach taken by Massachusetts.¹³ Finally, Part IV will compare Kentucky's approach to the issue of temporary employees with that of Massachusetts, and will endorse the latter.¹⁴

I. THE TEMPORARY WORKFORCE PHENOMENON

A recent survey by The Conference Board, a New York-based global research firm, reported that "the number of companies whose workforces consist of at least 10 percent contingent workers grew from 12 percent in 1990 to 21 percent in 1995 and is expected to reach 35 percent by the turn of the century"¹⁵ As these findings suggest, the use of contingent employment has substantially altered today's work environment; the temporary employee is an integral part of this transformation.¹⁶ In fact, the temporary employee population is by far "the fastest-growing employment category" in the country.¹⁷ Some commentators have gone

¹² See *infra* notes 37-137 and accompanying text.

¹³ See *infra* notes 138-48 and accompanying text.

¹⁴ See *infra* notes 149-67 and accompanying text.

¹⁵ Chris Mead, *Temporary Employers: A New Breed For A New Century*, DETROITER, May 1, 1996, at 17, available in 1996 WL 8800860.

¹⁶ For an in-depth survey of the demographics of this new employment category, see Sharon R. Cohany, *Workers in Alternative Employment Arrangements*, MONTHLY LAB. REV., Oct. 1, 1996, at 31, available in 1996 WL 10191296.

¹⁷ Dave Pelland, *Risk Managers Chart Course for Success at West Coast Conference*, RISK MGMT., Nov. 1, 1995, at 59, available in 1995 WL 12528410 (discussing the effects of temporary employment on risk management). The demand for temporary workers has not been confined to the United States. See Tenisha Mercer, *Temp Firm, Perm Plans*, CRAINS DET. BUS., June 24, 1996, at 3, available in 1996 WL 8425673 (discussing the emerging international markets for temporary employees). Temporary employment providers, such as Manpower Services, Inc. and Kelly Services, Inc., have become significant players in the international labor market. See *id.* ("Once serving local corporations, temporary-staffing companies now rush to supply multinational corporations with workers overseas."). Alfredo Maseli, Kelly's senior vice president and general manager of international operations, claims that Kelly's strategy is to have a presence "in all of the significant countries in Europe, South America and Asia." *Id.* In November, 1996, one commentator considered Manpower "the leader in globalization, with a brisk business in Europe and Asia and a world market share of 15 percent." Laura McClure, *It's Only Temporary: Temporary Work in the New U.S. Economy*, Multinational Monitor, Nov. 1996, at 14 ("According to

so far as to suggest that this rise in temporary employment has changed "[t]he face of the American workforce."¹⁸

In 1985, temporary employment agencies provided American companies with approximately 500,000 workers.¹⁹ By 1995, this number had grown tremendously, "mushroom[ing] to 2 million, or nearly 1.5 percent of the workforce of the United States."²⁰ In fact, according to the National Association of Temporary Staffing Services ("NATSS"), "[t]emporary employment increased almost 250 percent between the years of 1982 and 1993 — 10 times faster than overall employment growth."²¹

Revenues experienced by the top labor brokers reflect this explosion in demand for temporary labor.²² Between 1991 and 1994, the temporary employment industry's "overall payroll rose 47.7 percent" and "revenues grew 58.1 percent according to trade figures."²³ According to NATSS, the temporary employment industry "brought in nearly \$40 billion in 1995 with \$28 billion going to workers' payroll."²⁴

Manpower Executive Vice President James Fromstein, over half the agency's workers and half its sales are overseas. Kelly Services, too, is global.").

¹⁸ Jenero & Spognardi, *supra* note 10, at 127 (discussing the growing trend of temporary employment).

¹⁹ See Jenero & Spognardi, *supra* note 10, at 127.

²⁰ *Id.* (citing Barbara J. Feder, *Bigger Roles for Suppliers of Temporary Workers*, N.Y. TIMES, Apr. 1, 1995, 1, at 37); see also Mead, *supra* note 15 (citing a study done by Heidi Hartman, director of the Washington-based nonprofit Institute for Women's Policy Research, and stating that "in 1990, more than 19 million workers, or 16 percent of the total workforce, held contingent jobs"); James Aley, *The Temp Biz Boom: Why It's Good*, FORTUNE, Oct. 16, 1995, at 53, 55 ("There are currently between 5,000 and 6,000 temporary companies in the U.S., according to [National Association of Temporary Services]; ten years ago there were half as many.").

²¹ McClure, *supra* note 17, at 14 (discussing the advantages and disadvantages of temporary employment).

²² See Ray Tuttle, *Temporary Trend: Companies Using Temporary Firms To Ease Changes, Find Workers*, TULSA WORLD, Sept. 22, 1996, at E1, available in 1996 WL 2038843 (noting that "[i]n 1995, the nation's temporary businesses grew 12.9 percent from the previous year. Revenues topped a record 39.2 billion and payroll rose an identical 12.9 percent to 27.9 billion.").

²³ *Id.*

²⁴ Thomas Goetz, *Look For the Union Label: In the Effort to Organize Temp Workers, Business Doesn't See the Benefits*, THE VILLAGE VOICE, Jan. 21, 1997, at 38, 39; see also McClure, *supra* note 17, at 14 ("According to the National Association of Temporary Staffing Services (NATSS), the temporary help industry's receipts rose almost 13 percent last year, to a record high of

In addition to ever-increasing numbers of temporary employees, temporary agencies have been providing temporary employees to fill an increasing variety of positions in the American workforce.²⁵ Although clerical positions remain the mainstay of the temporary employment industry, recently the professional and technical fields represented have grown to include "chief financial officers, paralegals, and sales and marketing reps."²⁶ Managers in today's marketplace can hire virtually any kind of temporary employee, including attorneys²⁷ and physicians.²⁸

The popularity of temporary employees can be attributed to a variety of factors.²⁹ For example, "[corporate] downsizing, increased global

\$39.2 billion."); Mercer, *supra* note 17, at 3 (stating that Kelly Services "posted 1995 net earnings of \$69.5 million, a 14 percent increase on earnings of \$61.1 million in 1994").

²⁵ See Wiley, *supra* note 1. Carolyn Wiley writes:

According to a survey of temporary workers, office/clericals represent 43.1 percent of the 1993 payroll. Industrial workers or the blue-collar segment make up 30.4 percent. The technical segment represents 12 percent of payroll. Professionals represent 5.2 percent. Medicals (e.g., RNs, and medical technologists) constitute 6 percent of the payroll. Marketing, including demonstrators and telemarketing personnel, is 1.1 percent of payroll, and other categories of temporary employees represent 2.6 percent of the total industry payroll.

Id. See generally Lewis M. Segal & Daniel G. Sullivan, *The Temporary Labor Force*, ECON. PERSP., Mar.-Apr. 1995, at 2 (stating that the demographics of the temporary workforce are expanding); Jeffrey L. Hiday, *As Temp Employment Sector Changes, Workers Get Higher Pay, More Benefits*, WALL ST. J., Nov. 8, 1996, at B5C.

²⁶ Wiley, *supra* note 1, see also Mead, *supra* note 15, at 17 (quoting Jeanne Helter, executive vice-president and co-owner of Manpower of Detroit, as saying: "'Positions which require a bachelor's degree or some post-secondary degree are going to increase.'").

²⁷ See Wiley, *supra* note 1 (According to Pat Taylor, who runs a temporary agency in Washington, D.C., supplying temporary attorneys has become a "significant chunk" of her business. Taylor says that the traditional method of recruiting, i.e., summer internships for law students, is expensive. Her law firm clients find that hiring a temporary attorney is a less expensive recruiting method.); see also Aley, *supra* note 20, at 53; Larry Smith, *Temp Lawyers Enter Next Phase as Corporate Giants Acquire Agencies Nationwide*, OF COUNSEL, Jan. 15, 1996, at 1 (discussing the increasing use of temporary attorneys by employers).

²⁸ See Wiley, *supra* note 1.

²⁹ See generally Richard R. Carlson, *Variations on a Theme of Employment:*

competition, [and] technology" have played a significant role in the growth of this new industry.³⁰ Moreover, "the need to respond quickly to an ever-changing market place" motivates employers to seek the services of temporary employment agencies.³¹ Finally, "[o]ne of the traditional attractions for using contingent workers has been the savings associated with providing few, if any, benefits."³² To this end, the enormous influx of temporary employees into the American workforce is partly a result of employers who "do not want to be saddled with the high fixed costs and management tasks associated with full-time employees, including medical insurance, disability insurance, social security taxes, workers' compensation benefits, recruiting, training, career development costs and so on."³³ Rather, "[t]he tasks of recruiting, filling job assignments, training, paying a salary, and providing fringe benefits,

Labor Law Regulation of Alternative Worker Relations, 37 S. TEX. L. REV. 661, 688 (1996).

³⁰ See Wiley, *supra* note 1 (stating, in discussing the increasing use of temporary employees by American companies, that "[j]ust as the industrial revolution changed the very fabric of our society, the technological explosion [of the twentieth century] is transforming the U.S. Workplace."); see also Mead, *supra* note 15 ("Powerful market forces like corporate downsizing and outsourcing, harnessed to changes in personal lifestyles, continue to create a new breed of temporary workers. They've got the skills to command top pay and they're willing to work outside the traditional job structure.").

³¹ Wiley, *supra* note 1.

³² Phaedra Brotherton, *Staff to Suit (Temporary Employees)*, HR MAG., Friday, Dec. 1, 1995, at 50, 54 (discussing how employers "are beginning to use temporary employees not only to fill in gaps, but also in strategic ways that give them the fluidity to meet their fluctuating business needs").

³³ Donald J. McNerney, *Human Resource Management: Are Contingent Workers Really Cheaper?*, HUM. RESOURCE FOCUS, Sept. 1, 1995, at 1, 6, available in 1995 WL 8567771; see *id.* at 6 (stating that according to John H. Zimmerman, chief human resources officer, MCI Communications Corp., companies want "more flexibility with less obligation," and that companies are looking to reduce labor costs by leasing temps when demand is high and letting them go when demand is low); see also Brotherton, *supra* note 32, at 50 ("[E]mployers [can] more quickly adapt to fluctuating business cycles and provide better employment stability for their core workforce" by leasing temporary employees from temporary agencies); see generally Segal & Sullivan, *supra* note 25, at 7 (noting several reasons that employers are attracted to contingent workers, including lower wages, increased flexibility, maintenance of a dual internal labor market, economies of scale, and desire to screen potential permanent employees).

including retirement," become the responsibility of the temporary agency³⁴

Because this new employment relationship created by the temporary agency, recipient company, and temporary worker skews many of the concepts fundamental to employment law, its effect on states' workers' compensation laws has been widespread.³⁵ While most states are in general agreement on how to analyze the status of a temporary worker in the context of workers' compensation,³⁶ no bright lines have yet been drawn. An examination of Kentucky's handling of this tripartite relationship reveals that its analysis is quite typical.

。 II. KENTUCKY'S JUDICIAL TREATMENT OF TEMPORARY
EMPLOYEES IN THE CONTEXT OF WORKERS' COMPENSATION

A. M.J. Daly Co. v. Varney³⁷

In *M.J. Daly Co. v. Varney* ("M.J. Daly"), a chemical distributing plant in Ludlow, Kentucky, entered into a contract with Personnel Pool of Northern Kentucky, Inc. ("Personnel Pool"), a temporary employment agency, providing that the agency would lease a temporary worker to M.J. Daly.³⁸ Varney, an employee of Personnel Pool, was selected for the assignment,³⁹ and was injured while working at the chemical plant. After collecting his workers' compensation benefits from Personnel Pool, Varney brought a tort action against M.J. Daly alleging that the company was negligent and therefore responsible for his injuries.⁴⁰

Writing for the majority, Justice Leibson clearly defined the issue presented: "The question is whether M.J. Daly Co. can claim statutory immunity based on the exclusive remedy provisions of the Workers' Compensation Act⁴¹ by qualifying as either an 'employer' or as a

³⁴ See Wiley, *supra* note 1.

³⁵ See *infra* notes 132-34 and accompanying text.

³⁶ See *infra* notes 132-34 and accompanying text.

³⁷ *M.J. Daly Co. v. Varney*, 695 S.W.2d 400 (Ky. 1985).

³⁸ See *id.* at 401.

³⁹ See *id.* It is not clear from the court's opinion whether Varney was personally selected by M.J. Daly or if he was simply chosen by Personnel Pool for the assignment.

⁴⁰ See *id.*

⁴¹ KY. REV. STAT. ANN. § 342.690 (Michie 1997). This statute provides that if the employee has elected to be covered by workers' compensation, he is said to have surrendered his right to sue his employer for his work-related injuries,

'contractor' within the definition of those terms as used in the Act."⁴² The court then attempted to place M.J. Daly into one of these two categories.⁴³

After dismissing the suggestion that M.J. Daly be labeled a "contractor" for purposes of workers' compensation,⁴⁴ the court focused on whether M.J. Daly could be considered Varney's "employer."⁴⁵ The court relied heavily upon Professor Larson's treatise on workers' compensation and made use of Larson's "three prong test for the determination of when an employee is a loaned servant of another employer for purposes of workers' compensation coverage."⁴⁶ This test requires affirmative findings with regard to all three factors before the necessary employment relationship will be found.⁴⁷ These factors are:

- (a) the employee has made a contract of hire, expressed or implied, with the special employer;

and workers' compensation becomes his exclusive remedy. *See id.* The exclusive remedy provisions therefore allow the employee to collect workers' compensation benefits under a no-fault scheme of recovery, even though the right to sue has been forfeited. *See* 6 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 65.11, at 12-1 (1997). Similarly, while the employer subjects himself to the workers' compensation no-fault scheme, he takes advantage of immunity from common law actions. *See id.* The purpose of this process is to facilitate quick recoveries for injured employees. *See* Searcy v. Three Point Coal Co., 134 S.W.2d 228 (Ky. 1939).

⁴² *Varney*, 695 S.W.2d at 401.

⁴³ *See id.* at 401-03.

⁴⁴ *See id.* at 401. The court relied on *Bright v. Reynolds Metals Co.*, 490 S.W.2d 474 (Ky. 1973). Justice Leibson wrote that the term "contractor," as used in K.R.S. § 342.610(2), "is limited to its 'common usage,' meaning the situation where a "principal contractor" engages subcontractors to assist in the performance of the work or the completion of the project which the "principal contractor" has undertaken to perform *for another*." *Varney*, 695 S.W.2d at 401 (quoting *Bright*, 490 S.W.2d at 476). Because M.J. Daly had contracted with Personnel Pool for a person to do work for M.J. Daly and not "for another," the court rejected the idea that M.J. Daly could be a "contractor." *See id.* The definition of "contractor" under K.R.S. § 342.610(2) was broadened by the court one year later. *See infra* notes 66-98 and accompanying text.

⁴⁵ *See Varney*, 695 S.W.2d at 401-03.

⁴⁶ *Id.* at 402.

⁴⁷ *See id.*

- (b) the work being done is essentially that of the special employer;
and
- (c) the special employer has the right to control the details of the work.⁴⁸

Although the work being done was clearly that of the special employer and M.J. Daly had the requisite control over the work,⁴⁹ the court ruled that upon the facts presented, there was no contract of hire between M.J. Daly and Varney.⁵⁰ Consequently, Justice Leibson concluded that M.J. Daly was not Varney's "employer," and therefore Varney had retained his right to sue in tort.⁵¹

The court's inability to find a contract of hire between M.J. Daly and Varney was compelled by an examination of the contract between Personnel Pool and M.J. Daly as well as Varney's express refusal of M.J. Daly's offers of a more permanent position. The contract between M.J. Daly and Personnel Pool "expressly provided that Personnel Pool would be responsible for workers' compensation for employees furnished to M.J. Daly Co."⁵² Since responsibility for workers' compensation is typically

⁴⁸ LARSON & LARSON, *supra* note 41, § 48.00, at 8-434.

⁴⁹ As to the last two factors, the *Varney* court stated that "[i]t is clear that the work being done here was essentially that of the special employer and that the special employer had the right to control the details of the work." *Varney*, 695 S.W.2d at 402. While most courts find that temporary employees do the work of the special employer and are essentially controlled by the special employer, not all courts give such cursory treatment to these important factors when analyzing the employment status of temporary employees. *See, e.g.,* *Vigil v. Digital Equip. Corp.*, 925 P.2d 883 (N.M. Ct. App.), *cert. denied*, 923 P.2d 1164 (N.M. 1996) (discussing the control and work-of-special-employer factors); *Daniels v. Pamida, Inc.*, 561 N.W.2d 568 (Neb. 1997) (containing a limited discussion of the control and work-of-special-employer factors).

⁵⁰ *Varney*, 695 S.W.2d at 402. It is clear from his treatise that Professor Larson regards the "contract of hire" factor as the most important of the three. *See* 3 LARSON & LARSON, *supra* note 41, § 48.12, at 8-440 ("[C]ourts have usually been vigilant in insisting upon a showing of a deliberate and informed consent by the employee before employment relation will be held a bar to common-law suit." This vigilance is due to the significance of such a finding. "[T]he employee loses certain rights along with those he gains when he strikes up a new employment relation. Most important of all, he loses the right to sue the special employer at common law"). The requirement of a contract of hire is statutorily mandated in Kentucky. *See* K.R.S. § 342.640(1) (Michie 1997).

⁵¹ *See Varney*, 695 S.W.2d at 403.

⁵² *Id.*

assumed by the employer, the court found that by including this provision in the contract, Personnel Pool had in fact assumed the role of employer. Justice Leibson observed that "where the intent of the parties involved is expressed through such [a] contractual relationship[], the parties have fixed their status and we recognize their right to do so."⁵³ Moreover, the court noted that the right of parties to contract as they wish should be recognized in a "free enterprise system."⁵⁴

The court also found that M.J. Daly, before the explosion, had offered Varney employment but that Varney had expressly refused the offer and instead elected to remain an employee of Personnel Pool.⁵⁵ Because of the voluntary nature of both the employment relationship and workers' compensation coverage itself, significant weight was afforded this agreement.⁵⁶ Since Varney expressly refused employment with M.J. Daly, the availability of workers' compensation never arose, and therefore Varney had retained his right to sue M.J. Daly under common law. The court opined that like the contract between M.J. Daly and Personnel Pool, Varney's rejection of permanent employment "should be recognized."⁵⁷ Again citing Professor Larson, the court observed, "'Workers and employers must be allowed to make any arrangement they choose, and, if a worker prefers to be without compensation protection rather than an employee with compensation protection, that is his privilege.'"⁵⁸ Furthermore, "paternalism should not be carried so far that the state says to [a worker], 'We do not care what you want; we think employee status with compensation protection is better for you.'"⁵⁹

However, the court placed a caveat at the end of its decision noting that "[t]he burden for common law liability on [M.J. Daly was] not as significant as might appear at first blush."⁶⁰ Justice Leibson reassured

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See id.* at 401.

⁵⁶ *See* 1 LARSON & LARSON, *supra* note 41, at 8-307; *see also* 3 *id.* § 47.10, at 8-301 ("To thrust upon a worker an employee status to which he has never consented. might well deprive him of valuable rights under the compensation act, notably the right to sue his employer for common law damages.").

⁵⁷ *Varney*, 695 S.W.2d at 403. But *see infra* notes 99-124 and accompanying text for a discussion of *Joseph T. Griffin Co. v Florence*, No. 95-CA-0394-MR, slip op. (Ky. Ct. App. July 5, 1996).

⁵⁸ *Varney*, 695 S.W.2d at 402 (quoting 3 LARSON & LARSON, *supra* note 41, § 46.10, at 8-200).

⁵⁹ *Id.* (quoting 3 LARSON & LARSON, *supra* note 41, § 46.30, at 8-216).

⁶⁰ *Id.* at 403.

M.J. Daly that not only did its exposure to common law liability rest on a fault-based system, but that just as a recipient company may contract away its responsibilities as an employer, the company could contractually "require indemnification for any liability in tort that might occur by reason of utilizing the services of such a company"⁶¹ "The bottom line," noted the court, "is that the parties are free to contract as they wish[.]" and "[w]e are obliged to accept the status which they have expressed for themselves."⁶²

B. *Hawkins v. Technical Minerals, Inc.*⁶³

The factual scenario in *Hawkins v. Technical Minerals, Inc.* is essentially the same as that found in *Varney*. Hawkins was an employee of Omni Personnel ("Omni"), a labor service company. Pursuant to a contract between Omni and Technical Minerals ("TM"), Hawkins was assigned to work for TM. Hawkins suffered an injury to his hand while cleaning one of TM's chemical mixers.⁶⁴ In an eight-to-six decision, the court ruled that TM was Omni's contractor and therefore, pursuant to K.R.S. § 342.610(2)(b) and K.R.S. § 342.690, Hawkins was barred from bringing a negligence suit against TM.

Similarly to the situation in *Varney*, Hawkins was paid workers' compensation by Omni's carrier and then filed a suit against TM alleging that its negligence was the cause of his injuries.⁶⁵ Rather than applying the loaned employee test that was used in *Varney*, the court of appeals based its decision on the language of K.R.S. § 342.610(2)(b), the statute that defines the term "contractor." Judge Combs, writing for the majority, narrowed the issue to the following: "the status of TM vis-a-vis Omni — i.e., whether TM was a contractor for purposes of the workers' compensation statute."⁶⁶

The court then directed its attention to K.R.S. § 342.610(2), which reads, in pertinent part, as follows:

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Hawkins v. Technical Minerals, Inc.*, No. 93-CA-1958-MR, 1995 WL 680034 (Ky. Ct. App. Nov. 17, 1995), *aff'd sub nom.* United States Fidelity & Guaranty Co. v. Technical Minerals, Inc., 934 S.W.2d 266 (Ky. 1996).

⁶⁴ *See id.*

⁶⁵ *See id.* at *2-3.

⁶⁶ *Id.* at *2.

A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. A person who contracts with another

(b) To have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.⁶⁷

It was undisputed that TM and Omni had contracted to have work performed for TM by Hawkins. In addition, the court found that "[t]he work performed was a regular and recurring part of TM's business."⁶⁸ Consequently, the court concluded that "under the clear statutory definition, TM [was] a 'contractor' within the meaning of the Kentucky Workers' Compensation Act and Omni [was] a 'subcontractor.'"⁶⁹

The court next directed its attention to the language of K.R.S. § 342.690(1), the exclusive remedy provision of Kentucky's Workers' Compensation Act. That statute provides in pertinent part:

If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation.⁷⁰

The court opined that since TM met the statutory definition of "contractor" provided in K.R.S. § 342.690, TM could claim immunity from common law suits by Omni's employees.⁷¹ Moreover, not only was TM immune from a negligence action by Hawkins, but because Omni had properly secured workers' compensation coverage for Hawkins, TM was

⁶⁷ K.R.S. § 342.610(2) (Michie 1997).

⁶⁸ *Hawkins*, 1995 WL 680034, at *3.

⁶⁹ *Id.*

⁷⁰ K.R.S. § 342.690(1) (Michie 1997).

⁷¹ *Hawkins*, 1995 WL 680034, at *4.

not liable for any additional workers' compensation payments.⁷² As a result, TM's motion for summary judgment was granted.⁷³

In arguing TM was not a "contractor" under K.R.S. § 342.610(2)(b), Hawkins relied on the Kentucky Supreme Court's decision in *Varney*. Hawkins urged that the *Varney* court, ruling upon facts almost identical to the facts at hand, had found that the recipient company, M.J. Daly, was not a "contractor" within the meaning of the Act.⁷⁴ Hawkins argued that the *Varney* court, relying on *Bright v. Reynolds Metals Co.*,⁷⁵ ruled that the term "contractor" "is limited to its 'common usage,' meaning the situation where a 'principal contractor' engages subcontractors to assist in the performance of the work or the completion of the project which the 'principal contractor' has undertaken to perform for another."⁷⁶ Because he was doing work for TM and not "for another," Hawkins argued that TM could not successfully define itself as a "contractor" under K.R.S. § 342.610(2).⁷⁷

The court rejected Hawkins' argument. Rather, it found that the *Varney* court's definition of "contractor" was incorrect because it indirectly relied on a repealed statute. The court explained that on January 1, 1973, more than ten years before the decision in *Varney*, "the statutory scheme under which *Bright v. Reynolds Metals Co.* was decided was repealed effective January 1, 1973."⁷⁸ The *Hawkins* court further stated that "[d]isregarding [this] specific change in the statutory language and the definition of 'contractor' found in KRS § 342.610(2), the court

⁷² See *id.*

⁷³ See *id.* at *7

⁷⁴ See *supra* note 44 and accompanying text.

⁷⁵ *Bright v. Reynolds Metals Co.*, 490 S.W.2d 474 (Ky. 1973).

⁷⁶ *M.J. Daly Company v. Varney*, 695 S.W.2d 400, 401 (Ky. 1985) (quoting *Bright*, 490 S.W.2d at 474).

⁷⁷ See *Hawkins*, 1995 WL 680034, at *5.

⁷⁸ *Id.* (quoting the trial court's opinion). The court's decision in *Bright* was governed by K.R.S. § 342.060, which provided in pertinent part:

A principal contractor, intermediate or subcontractor shall be liable for compensation to any employee injured while in the employ of any one of his intermediate or subcontractors and engaged upon the subject matter of the contract, to the same extent as the immediate employer

This section shall apply only in cases where the injury occurred on, in or about the premises on which the principal contractor has undertaken to execute work or which are under his control otherwise or management.

K.R.S. § 342.060 (Michie 1997).

in [*Varney*] continued to define the term on the basis of common law principles."⁷⁹

The *Hawkins* court then explained that this discrepancy in the definition of "contractor" was remedied by the court one year after the *Varney* decision in *Fireman's Fund Insurance Co. v. Sherman & Fletcher*^{80,81} In *Sherman & Fletcher*, the court "concluded that the definition of 'contractor' in KRS § 342.610(2) was broad enough to encompass far more than the limited definition found in [*Varney*]."⁸² Justice Vance, writing for the majority in *Sherman & Fletcher*, observed:

Following the decision in *Bright v. Reynolds Metals Co.*, the General Assembly enacted KRS 342.610 in its present form which provides that a person who contracts with another to do work of a kind which is a recurrent part of the work of the trade or occupation of such person shall be deemed a contractor. We construe this to mean that a person who engages another to perform a part of the work which is a recurrent part of his business, trade, or occupation is a contractor. Even though he may never perform that particular job with his own employees, he is still a contractor if the job is usually a regular or recurrent part of his trade or occupation.⁸³

This new statutory scheme moved the focus of the "contractor" analysis from who was the beneficiary of the work to what kind of work was being done. With this in mind, Judge Combs concluded that in light of TM's contract with Omni, whereby Hawkins would perform work that was a recurrent part of TM's business, TM was a "contractor" and Omni

⁷⁹ *Hawkins*, 1995 WL 680034, at *5.

⁸⁰ *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986).

⁸¹ See *Hawkins*, 1995 WL 680034, at *5.

⁸² *Id.*

⁸³ *Sherman & Fletcher*, 705 S.W.2d at 462. But see *id.* at 467 (Leibson, J., dissenting). Judge Leibson wrote:

[T]he statutory language was not reworked in 1972 to overrule *Bright*. If anything, the statutory changes effected in 1972 reinforced *Bright*. Dropping the word "principal" from the Section of the Act specifying that a "contractor" may be liable for workers' compensation, reinforces [sic] *Bright* because, if anything, an owner/builder falls more readily under the term "principal contractor" than under the term "contractor." The term "contractor" quite obviously refers to a general contractor who contracts with the owner to build the project for him.

was a “subcontractor” under K.R.S. § 342.610(2).⁸⁴ Consequently, because TM still carried responsibility for paying Hawkins’ workers’ compensation benefits in the event that Omni was not adequately covered,⁸⁵ TM was entitled to the *quid pro quo* of immunity from common law tort action by Hawkins.

Judge Gudgel, joined by five other judges, drafted the dissenting opinion in *Hawkins*. Rather than return to the “employer/employee” approach espoused in *Varney*, Judge Gudgel based his decision on the same statutory language (K.R.S. § 342.610(2)) relied upon by the majority. The dissent focused heavily on the court’s decisions in *Sherman & Fletcher* and *Varney*. In *Sherman & Fletcher*, David George was an employee of a framing subcontractor who agreed to perform some framing carpentry for Sherman & Fletcher, owners and developers of a town house construction project.⁸⁶ While George was working on the project, he was killed when a concrete block wall at the construction site collapsed.⁸⁷ George’s estate received workers’ compensation benefits from Elder, Inc. and pursued a negligence action against Sherman & Fletcher.⁸⁸

The court found that Sherman & Fletcher bore no liability because pursuant to K.R.S. § 342.610(2), Sherman & Fletcher had contracted with Elder, Inc. to have work performed that was a “regular or recurrent part of the work of the business of building construction.”⁸⁹ Commenting on the court’s decision in *Sherman & Fletcher*, Judge Gudgel observed:

The court emphasized . . . that the present statute [K.R.S. § 34.610(2)] requires that before an alleged statutory employer may come within the purview of the statute, that party must either contract with or engage another to do work of a kind which is a regular or recurrent part of the alleged statutory employer’s trade or occupation. The focus of the

⁸⁴ See *Hawkins*, 1995 WL 680034, at *6.

⁸⁵ See *id.* Pursuant to K.R.S. § 342.700(2), popularly known as the “up-the-ladder statute,” if the subcontractor, which is primarily responsible for workers’ compensation coverage, fails to provide adequate coverage, the responsibility goes “up the ladder” to the principal contractor. See *Sherman & Fletcher*, 705 S.W.2d at 466. The *Hawkins* court explained that “TM would have been liable for workers’ compensation benefits to Hawkins if Omni, his employer, had not already secured those benefits.” *Hawkins*, 1995 WL 680034, at *6.

⁸⁶ See *Sherman & Fletcher*, 705 S.W.2d at 460.

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ *Id.* at 462.

statute, therefore, is on the contract between the alleged statutory employer and the injured worker's employer, rather than upon the relationship between the alleged statutory employer and the injured worker.⁹⁰

Judge Gudgel endorsed the decision reached by the court in *Sherman & Fletcher* because its focus was on the contract between Sherman & Fletcher and Elder, Inc.⁹¹ That contract was for the performance of work that was a regular or recurrent part of Sherman & Fletcher's business, i.e., framing carpentry, and therefore made Sherman & Fletcher a "contractor" as defined by K.R.S. § 342.610(2).

On the other hand, Judge Gudgel noted that the court in *Varney* seemed to have taken "an arguably contradictory" approach by focusing more on any contract between M.J. Daly (alleged statutory employer) and Varney (injured worker) rather than on the contract that existed between M.J. Daly, the general employer, and Personnel Pool, the recipient company.⁹² Notwithstanding this discrepancy, Judge Gudgel was convinced that the court's decision in *Varney* was appropriate because the contract between M.J. Daly and Personnel Pool simply provided for a worker's general services. Unlike the contract between Sherman & Fletcher and Elder, Inc., M.J. Daly did not contract with Personnel Pool for work that was a regular or recurrent part of M.J. Daly's business or occupation.⁹³ In other words, general labor was not a "regular or recurrent part" of M.J. Daly's business.⁹⁴ Consequently, "because [M.J.] Daly's contract with the labor services company did not involve an agreement by which the labor services company would perform work of a kind which was a regular or recurrent part of M.J. Daly's business, the

⁹⁰ *Hawkins*, 1995 WL 680034, at *14 (Gudgel, J., dissenting).

⁹¹ Although Judge Gudgel advocated scrutiny of the contract between the general employer and the special employer, most jurisdictions have held that the focus should be on the employee. See 3 LARSON & LARSON, *supra* note 41, § 47.10, at 8-301 (stating that in master-servant cases the analysis should focus on the two employers because the employee does not stand to lose any significant rights. However, in compensation cases, the focus is properly on the employee because his rights to sue could be jeopardized. It is precisely this which necessitates a finding of a contract of hire between the "special employer" and the employee.).

⁹² *Hawkins*, 1995 WL 680034, at *14 (Gudgel, J., dissenting).

⁹³ See *id.* at *16.

⁹⁴ *Id.*

court correctly concluded that [M.J.] Daly was not the worker's statutory employer."⁹⁵

Finally, Judge Gudgel turned his attention to the present dispute among TM, Omni, and Hawkins. Recognizing that TM had never claimed to be Hawkins' "actual employer for purposes of the workers' compensation act," the analysis rested solely on the question of whether TM could be considered Hawkins' "statutory employer pursuant to KRS 342.610(2)."⁹⁶ Judge Gudgel drew a distinct parallel between TM's status and the status of M.J. Daly. Focusing on the contract between TM and Omni, Judge Gudgel noted that TM contracted with Omni for "a worker who would assist TM in performing various duties."⁹⁷ The contract with Omni did not provide for Omni's "performance, supervision or control of work of a kind which was a regular or recurrent part of TM's trade or business."⁹⁸ Because of the nature of the contractual relationship between the parties, Judge Gudgel concluded that TM could not take advantage of either the contractor status provided in K.R.S. § 342.610(2) or the accompanying immunity from common law suit.

C. *Joseph T. Griffin Co. v. Florence*⁹⁹

Joseph T. Griffin Co. v. Florence was decided in 1996 by the Kentucky Court of Appeals and, as in most cases on this issue, its basic facts are typical. Joseph T. Griffin Company ("Griffin") obtained the services of Florence from Career Connection, a temporary labor provider. While working for Griffin, Florence was injured. Thereafter, Florence received workers' compensation payments from Career Connection and brought suit against Griffin for negligence.¹⁰⁰

Rather than follow the court's statutory analysis in *Hawkins*, the *Florence* court focused upon the question of whether or not Florence could be considered Griffin's employee. Following *Varney*, the court applied Professor Larson's loaned employee test and concluded that Griffin was Florence's special employer for purposes of workers'

⁹⁵ *Id.*

⁹⁶ *Id.* at *17

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Joseph T. Griffin Co. v. Florence*, No. 95-CA-0394-MR, slip op. (Ky. Ct. App. July 5, 1996). This decision is not final and shall not be cited as authority in any courts of the Commonwealth of Kentucky.

¹⁰⁰ *See id.* at 10

compensation.¹⁰¹ As a result, the court ruled that Griffin could claim immunity from Florence's suit for negligence.¹⁰² As in *Varney*, it was undisputed that "Florence was performing the work of [the recipient company] when he was injured, that [the recipient company] had the right to control the details of Florence's work, and that Florence had no express contract of hire with [the recipient company]."¹⁰³ Therefore, the determinative question was whether an implied contract of hire existed between Florence and Griffin.

Writing for the court, Chief Judge Wilhoit considered the inherent structure of the temporary employment agency itself in concluding that Florence had, in fact, entered into an implied contract of employment with Griffin.¹⁰⁴ Like Justice Leibson in *Varney*, Judge Wilhoit relied on the voluntariness of the parties' entry into a working relationship.¹⁰⁵ However, while Justice Leibson hung his voluntariness hat on Varney's express refusal to become an M.J. Daly employee, Judge Wilhoit's situation was a little more difficult. Unlike Varney, Florence was never expressly offered a position with the recipient company; therefore, he never expressly stated to anyone what his employment intentions were. In gauging whether Hawkins voluntarily entered into an employment contract with Griffin, Judge Wilhoit had to rely solely on Hawkins' actions.¹⁰⁶ The judge observed that "[Florence] had the choice to accept or decline the employment after being told of the job's requirements."¹⁰⁷ In addition, it was Florence himself who "assented to perform the work for Joseph Griffin Company [and] [t]he company, in turn, assented to [Florence's] doing so."¹⁰⁸

Ultimately, the court ruled that "through Florence's voluntary choice of working for and accepting the control of Joseph Griffin Company, and its accepting him to do the work, an implied contract of hire between him and the company existed."¹⁰⁹ Because Judge Wilhoit found Griffin to

¹⁰¹ *See id.*

¹⁰² *See Florence*, No. 95-CA-0394-MR, at 10.

¹⁰³ *Id.* at 11.

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Notice that unlike Judge Gudgel's approach, Judge Wilhoit focused on the relationship between Florence, the employee, and Griffin, the alleged employer.

¹⁰⁹ *Id.* One inherent aspect of temporary employment through a temporary agency such as Career Connection is that the temporary employee receives his

be Florence's employer for purposes of workers' compensation, and thus immune from Florence's common law suit, the court declined "to address whether [Griffin] qualified for tort immunity based on the 'contractor-under' statute [K.R.S. § 342.610(2)]."¹¹⁰

In a dissenting opinion, Judge Knopf disagreed that an implied contract for hire existed between the parties.¹¹¹ Although he agreed with Judge Wilhoit that it is proper for the court to find an implied contract of hire through an examination of the facts of a case, Judge Knopf explained that such a contract must still "contain all of the elementary ingredients of a written contract."¹¹² According to Judge Knopf, Florence and Griffin never "intended to enter into a contract with one another [and as such, they never had a] meeting of the minds."¹¹³ Harkening back to Professor Larson's warning concerning the dangers of allowing unsuspecting individuals to have an employment status thrust upon them, Judge Knopf articulated the query as whether Florence intended to contract with Griffin Company to become its employee for workers' compensation purposes.¹¹⁴

Analyzing the same "unique circumstances [inherent in] labor service companies"¹¹⁵ that Judge Wilhoit had focused on in finding an implied contract of hire, Judge Knopf arrived at the opposite conclusion — that no contract of hire existed as between Florence and Griffin.¹¹⁶ The judge observed:

payment directly from the temporary agency. The court disregarded this fact in its finding that Florence's wages were indirectly paid by Griffin via its payments to Career Connection. *See id.*

¹¹⁰ *Id.*

¹¹¹ *See id.* (Knopf, J., dissenting).

¹¹² *Id.* at 12 (Knopf, J., dissenting).

¹¹³ *Id.* (Knopf, J., dissenting).

¹¹⁴ *See id.* (Knopf, J., dissenting); 3 LARSON & LARSON, *supra* note 41, § 48.30, at 8-434.

¹¹⁵ *Florence*, No. 95-CA-0394-MR, at 12-13.

¹¹⁶ *See id.* Judge Knopf did not focus on whether Griffin intended to contract with Florence, but rather on whether Florence intended to contract with Griffin. This analysis corresponds with Professor Larson's writings on the subject. Larson suggests that "[i]n compensation law, the spotlight must now be turned upon the employee, for the first question of all is: Did he make a contract of hire with the [alleged] special employer?" 3 LARSON & LARSON, *supra* note 41, § 48.11, at 8-440. The focus on the employee is a result of the rights that he gives up if a contract of hire is found. *See supra* note 41.

Florence did not negotiate with Joseph Griffin Co. for employment. Although Florence did agree to do work that the Joseph Griffin Co. needed, this obligation was made to Career Connection in response to his contract with Career Connection. Florence did not meet with the Joseph Griffin Co. until he had already obligated himself to do the work. Career Connection then instructed Florence as to where and when to make his first contact with the Joseph Griffin Co. Florence was paid by Career Connection and, after Florence had completed the temporary work for the Joseph Griffin Co., Florence would have continued to work for Career Connection and looked to Career Connection for future job assignments.¹¹⁷

In addition, Judge Knopf pointed out that the labor service provider “‘d[id] all the payroll paper work, and maintain[ed] the benefits for [Florence].’”¹¹⁸

Furthermore, Judge Knopf asked why any worker would elect to be “covered by two (2) workers’ compensation insurance policies, one provided by the labor service company and one provided by the client when the worker can only recover under one (1) policy?”¹¹⁹ He opined that a well informed worker would never give up his “constitutional rights to be compensated for another’s negligence” for the opportunity to be doubly covered under workers’ compensation.¹²⁰ This is especially true when the worker gives up his right to be compensated from the very “employer” who is the most likely to cause his injury. Judge Knopf urged that when presented with such choices, Florence surely would have elected to be covered by Career Connection’s workers’ compensation insurance policy and retain his right to sue Griffin, since it was Griffin, not Career Connection, that was in the best position to protect Florence from a work-related injury.¹²¹

The dissent proceeded to reject the majority’s decision that this case differed from *Varney* in that Florence never expressly refused employment status with Griffin.¹²² The fallacy in such an argument, noted Judge Knopf, is that rather than focusing on the “employee,” the

¹¹⁷ *Florence*, No. 95-CA-0394-MR, at 12-13.

¹¹⁸ *Id.* at 13 (quoting *M.J. Daly Co. v. Varney*, 695 S.W.2d 400, 402 (Ky. 1985)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See id.* at 14.

majority's analysis turns on the actions of the alleged special employer. The significance of this fundamental difference is that "[t]he offer of permanent employment by a third party is beyond the employee's control. Not every employee will have the chance, as Varney did, to turn down the offer so that he will not be considered an employee of the company"¹²³ If the client company wants "to become the 'employer' for purposes of the Workers' Compensation Act, then they must contract to do so. Otherwise, the law should not imply that the contracts exist."¹²⁴

D. United States Fidelity & Guaranty Co. v. Technical Minerals, Inc.¹²⁵

The Kentucky Court of Appeals' holding in *Hawkans v. Technical Minerals, Inc.* was reaffirmed by the Kentucky Supreme Court in *United States Fidelity & Guaranty Co. v. Technical Minerals, Inc.* ("U.S.F.&G."). The court stated that "[t]he viability of Hawkins' tort claim depends on whether the case of *M.J. Daly Co. v. Varney* was overruled by implication in *Fireman's Fund Insurance Co. v. Sherman & Fletcher*"¹²⁶ The significance of those two cases, of course, was in their interpretation of the term "contractor" as used in K.R.S. § 342.610(2).¹²⁷ The court concluded that *Varney* was in fact implicitly overruled by the decision in *Sherman & Fletcher*¹²⁸

The Kentucky Supreme Court's analysis in *U.S.F.&G.* closely resembles that of the Court of Appeals in *Hawkans*. Technical Minerals ("TMI"), the *U.S.F.&G.* court noted, "contracted to have work performed by a contract employee. The work performed was a regular and recurring part of TMI's business. Therefore, under the clear statutory definition, TMI is a 'contractor' within the meaning of the Kentucky Workers' Compensation Act and the contract labor company is a 'subcontractor.'"¹²⁹ At the end of its opinion, the court recognized that a contrary conclusion would have the effect of "destroy[ing] the temporary services

¹²³ *Id.* at 7

¹²⁴ *See id.* at 15.

¹²⁵ *United States Fidelity & Guaranty Co. v. Technical Minerals, Inc.*, 934 S.W.2d 266 (Ky. 1996).

¹²⁶ *Id.* at 267

¹²⁷ *See supra* notes 44, 74-85.

¹²⁸ *See Technical Minerals*, 934 S.W.2d at 269.

¹²⁹ *Id.*

industry”¹³⁰ The court, concerned with providing a windfall for temporary employees, added:

Historically, a major reason employers were willing to provide Workers' Compensation benefits was to be free of common law civil liability. By the argument of plaintiffs in this case, such would be totally frustrated and the plaintiff would have the best of both worlds, Workers' Compensation benefits and a common law right of action. By contrast, the defendant/employer would have the worst of both worlds and this could not have been legislative intent.¹³¹

Many states have been as reluctant as Kentucky to allow a temporary worker to bring a common law suit against a recipient company.¹³² Like Kentucky, most of these states have used Larson's loaned employee test to determine whether or not a temporary employee had become an employee of the recipient company and thus was barred from bringing a common law suit against the recipient company.¹³³ Because of the very nature of the temporary employment structure, courts have not had much difficulty in finding that the second and third prongs of the loaned employee test are satisfied. In analyzing the first, and according to

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² For cases holding that a recipient company enjoys common law immunity from suits by temporary employees provided by temporary employment agencies, see *Keller v. Evans Cooperage, Inc.*, 641 So. 2d 552 (5th Cir. 1994); *Tweedy v. Tennessee Valley Auth.*, 882 F.2d 477 (11th Cir. 1989); *Honey v. United Parcel Serv.*, 879 F. Supp. 615 (S.D. Miss. 1995); *Santa Cruz Poultry, Inc. v. Stier*, 239 Cal. Rptr. 578 (Ct. App. 1987); *Fletcher v. Apache Hose & Belting Co.*, 519 N.W.2d 839 (Iowa Ct. App. 1994); *Whitehead v. Safway Steel Prods.*, 497 A.2d 803 (Md. 1985); *Kidder v. Miller-Davis Co.*, 564 N.W.2d 872 (Mich. 1997); *Daniels v. Pamida, Inc.*, 561 N.W.2d 568 (Neb. 1997); *Vigil v. Digital Equip. Corp.*, 925 P.2d 883 (N.M. Ct. App.), *cert. denied*, 923 P.2d 1164 (N.M. 1996); *Henderson v. Manpower of Guilford County*, 319 S.E.2d 690 (N.C. Ct. App. 1984); *Newman v. Indus. Comm'n of Ohio*, 673 N.E.2d 1301 (Ohio 1997); *Backnall v. Westwood Corp.*, 747 P.2d 412 (Or. Ct. App. 1987), *aff'd*, 764 P.2d 544 (Or. 1988); *Sorenson v. Colibri Corp.*, 650 A.2d 125 (R.I. 1994); *Goodman v. Sioux Steel Co.*, 475 N.W.2d 563 (S.D. 1991); *Meka v. Falk Corp.*, 306 N.W.2d 65 (Wis. 1981).

¹³³ See, e.g., *Henderson*, 319 S.E.2d at 694; *Vigil*, 925 P.2d at 885; *Daniels*, 561 N.W.2d at 570. But see *Honey*, 879 F. Supp. at 617 (applying the common law concept of borrowed servant to temporary employment relationship); *Kidder*, 564 N.W.2d at 879 (applying an economic reality test).

Professor Larson the most important, prong, courts have used an approach similar to that used by Judge Wilhoit in *Florence*.¹³⁴

Nevertheless, there are jurisdictions that no longer use the loaned employee test when dealing with temporary employees.¹³⁵ A majority of these states have adopted legislation that pertains to the temporary employment relationship.¹³⁶ As a result, there are statutes that provide the recipient company with employer immunity as well as statutes that allow a temporary employee to bring suit against the temporary employment agency.¹³⁷ An example of the latter comes from Massachusetts.

III. A LOOK TO MASSACHUSETTS

Through two statutes, Massachusetts has developed a clear approach to handling workers' compensation exclusivity-of-remedy issue in the temporary employment context. The Massachusetts Appeals Court, the state's intermediate appellate court, examined both statutes in *Lang v. Lamothe Co.*¹³⁸ Lang, an employee of Peakload Inc., a company engaged in the business of providing employers with temporary workers, was "lent" to the Lamothe Company ("Lamothe"). Although both Peakload and Lamothe provided the plaintiff with workers' compensation coverage, the contract between the two employers did not specifically

¹³⁴ See *supra* notes 101-10 and accompanying text.

¹³⁵ For example, Michigan and Pennsylvania have both rejected Larson's three-part test. See *Kidder*, 564 N.W.2d at 872 (utilizing an economic reality test); *Daily Exp. Inc. v. Workmen's Compensation Appeal Bd.*, 406 A.2d 600, 601-02 (Pa. Commw. Ct. 1979) (setting forth a seven-part test based primarily on control rather than consent).

¹³⁶ The following states have specifically addressed this issue: California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Rhode Island, and Wisconsin. See CAL. INS. CODE § 11663 (West 1997); COLO. REV. STAT. § 8-41-303 (Bradford 1997); CONN. GEN. STAT. ANN. § 31-292 (West 1997); HAW. REV. STAT. § 366-1 (1993); 820 ILL. COMP. STAT. 305/1-(1)(a)(4) (West 1997); MASS. ANN. LAWS ch. 152, § 18 (Law Co-op. 1997); R.I. GEN. LAWS § 28-29-2(6)(iii) (West 1996); WIS. STAT. ANN. § 102.29 (West 1997). Elizabeth J. Fullenkemp, *Goodman v. Sioux Steel Co.: South Dakota Limits Temporary Employees' Recovery to Workers' Compensation*, 38 S.D. L. REV. 379, 386 n.72 (1993).

¹³⁷ Only one state, Hawaii, allows suit against the recipient company or special employer. See Fullenkemp, *supra* note 136.

¹³⁸ *Lang v. Lamothe Co.*, 479 N.E.2d 208 (Mass. App. Ct. 1985).

address the issue of overlapping coverage.¹³⁹ After Lang was injured while working on Lamothe's premises, he received workers' compensation benefits from Peakload. Subsequently, he brought a negligence suit against Lamothe.

Lamothe argued that pursuant to chapter 152, section 15 of the Massachusetts General Laws ("G.L. ch. 152 § 15"), it was immune from suit by temporary employees.¹⁴⁰ The last sentence of this section reads as follows:

Nothing in this section, or in section eighteen or twenty-four shall be construed to bar an action at law for damages for personal injuries or wrongful death by an employee against any person other than the insured person employing such employee and liable for payment of the compensation provided by this chapter for the employee's personal injury or wrongful death and said insured person's employees.¹⁴¹

Lamothe, contending that it fell within the class of those protected by G.L. ch. 152 § 15, argued that it had both employed Lang and, because it had covered Lang through its workers' compensation carrier, was "liable for payment of compensation" to Lang.¹⁴²

The court rejected Lamothe's claim and instead "reasoned that [for] an employer to be immune under [chapter 152] from an employee's common law action, he must satisfy a two-part test: '(1) the employer must be an insured person liable for the payment of compensation, and (2) the employer must be the direct employer of the employee.'"¹⁴³

The court ruled that Lamothe had failed to satisfy the first prong of the above test. Interpreting G.L. ch. 152 § 15, the court reasoned that "the only person who will be immune from an action at law is 'the insured person employing such employee and liable for payment of the [workers'] compensation [benefits].'"¹⁴⁴ Therefore, the question became: Was Lamothe liable for Lang's workers' compensation payments? The court found its answer in chapter 152, section 18 of the Massachusetts General Laws ("G.L. ch. 152 § 18").¹⁴⁵

¹³⁹ *See id.*

¹⁴⁰ *See id.* at 209.

¹⁴¹ MASS. ANN. LAWS ch. 152, § 15 (West 1988).

¹⁴² *Lang*, 479 N.E.2d at 209.

¹⁴³ *Id.* (quoting the trial court's decision).

¹⁴⁴ *Id.* (quoting the trial court's decision).

¹⁴⁵ Chapter 152, section 18 of the Massachusetts General Laws reads in part:

That statute provides that when the relationship involves a special employer and a general employer, the general employer, absent an agreement between the "employers" to the contrary, shall have the responsibility of providing the employee with workers' compensation coverage.¹⁴⁶ Recognizing that Peakload was Lang's general employer and that Lamothe was Lang's special employer,¹⁴⁷ the court opined that the "unambiguous" language of G.L. ch. 152 § 18 places the burden of liability for the payment of workers' compensation on the general employer — in this case, on Peakload.¹⁴⁸ Consequently, because Lamothe bore no liability for providing the plaintiff with workers' compensation coverage, G.L. ch. 152 § 15 did not clothe Lamothe with statutory immunity from a common law suit by Lang.

IV A COMPARISON OF KENTUCKY'S
K.R.S. §§ 342.610(2) AND 342.690 WITH
MASSACHUSETTS' G.L. CH. 152 §§ 15 AND 18

G.L. ch. 152 § 18 and K.R.S. § 342.610(2),¹⁴⁹ the Kentucky statute used by the courts in *Varney* and *Hawkins*, produce results that are similar in two respects. First, both statutes place workers' compensation liability on one of the parties, the general employer in a general employer/special employer setting (Massachusetts), or the subcontractor in a contractor/subcontractor setting (Kentucky). Because temporary agencies like Manpower are deemed to be general employers in Massachusetts and subcontractors in Kentucky,¹⁵⁰ these two statutes have the

In any case where there shall exist with respect to an employee a general employer and a special employer relationship, as between the general employer and the special employer, *the liability for the payment of compensation for the injury shall be borne by the general employer* or its insurer, and the special employer or its insurer shall be liable for such payment if the parties have so agreed or if the general employer shall not be an insured or insured person under this chapter.

MASS. ANN. LAWS. ch. 152, § 18 (1911) (as amended 1969) (Law. Co-op 1989) (emphasis added).

¹⁴⁶ See *id.*

¹⁴⁷ The parties conceded the existence of such a relationship. See *Lang*, 479 N.E.2d at 209. See Ramsey's Case, 360 N.E.2d 911 (1977) for a brief discussion of special and general employers.

¹⁴⁸ *Lang*, 479 N.E.2d at 209.

¹⁴⁹ See text accompanying *supra* note 67 for the relevant text of this statute.

¹⁵⁰ See *supra* notes 125-31.

same effect: they burden the temporary agency with liability for the temporary employee's workers' compensation benefits. Additionally, both statutes place potential liability on the recipient company (the special employer or contractor depending on the jurisdiction). Specifically, both statutes provide that the recipient company must provide workers' compensation coverage to the temporary employee if the temporary agency is not properly covered or fails to make compensation payments.¹⁵¹

Despite these similarities, G.L. ch. 152 § 18 and K.R.S. § 342.610(2) contain significant differences. While section 18 allows the general employer and special employer to shift liability for workers' compensation to the recipient company (the special employer) through agreement, K.R.S. § 342.610(2) does not allow contracting parties such freedom. Rather, under K.R.S. § 342.610(2), a subcontractor and contractor are precluded from shifting the subcontractor's (temporary agency's) liability for workers' compensation.¹⁵² Additionally, unlike G.L. ch. 152 § 18, under K.R.S. § 342.610(2), if the liability shifts from the temporary employment agency to the recipient company, the recipient company can seek indemnification from the temporary employment agency.¹⁵³

These differences exist because unlike Kentucky, Massachusetts has recognized a difference between contractor/subcontractor relationships on the one hand and general employer/special employer relationships on the other. While G.L. ch. 152 § 18's second paragraph addresses the general employer/special employer concerns mentioned above, its first paragraph specifically addresses the contractor/subcontractor relationship.¹⁵⁴ Not

¹⁵¹ Note that G.L. ch. 152 § 18 also allows the parties to place the primary liability on the recipient company by agreement.

¹⁵² See *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459 (Ky. 1986).

¹⁵³ See *id.* at 463-64.

¹⁵⁴ G.L. ch. 152 § 18's first paragraph provides in relevant part:

If an insured person enters into a contract . . . with a sub-contractor and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the sub-contractors were insured persons. The insurer shall be entitled to recover from the uninsured sub-contractor all compensation benefits and expenses, medical, hospital or otherwise, that it has paid or may become obligated to pay on account of any injury to the employee or employees of any such uninsured

surprisingly, G.L. ch. 152 § 18's treatment of contractors and subcontractors is nearly identical to that provided in K.R.S. § 342.610. That is, under G.L. ch. 152 § 18, a subcontractor and contractor cannot shift the subcontractor's liability for workers' compensation. Moreover, under G.L. ch. 152 § 18, if a contractor pays workers' compensation payments to an employee of the subcontractor, that contractor is allowed to seek indemnification from the subcontractor. Evidently, the Massachusetts legislature appreciated a difference between workers' compensation issues involving contractors and subcontractors and those involving temporary employees provided to recipient companies by temporary agencies.

When G.L. ch. 152 § 18 and K.R.S. § 342.610 are paired with their exclusiveness-of-remedy counterparts, the differences between the two jurisdictions becomes even more apparent. First, the courts in Kentucky, as evidenced in *U.S.F.&G.*, interpret K.R.S. § 342.610(2) and K.R.S. § 342.690 to provide the contractor and the subcontractor with statutory immunity from common law suits by injured employees. Unlike G.L. ch. 152 §§ 15 and 18, K.R.S. §§ 342.610(2) and 342.690 provide the contractor (special employer) with immunity despite the fact that the employee is adequately covered by the subcontractor (general employer).¹⁵⁵

Take, for instance, a scenario like the one described in the introduction. Employee number one, a regular employee, and Employee number two, a temporary employee lent to the company by an agency like Manpower, are working on an assembly line when both are injured by machinery that has been negligently maintained. According to the court in *U.S.F.&G.*, K.R.S. § 342.610(2) and K.R.S. § 342.690 would work together to provide the recipient company with statutory immunity from a suit by Employee number two.¹⁵⁶ The rationale behind such a decision is that although the temporary employment agency is primarily liable for workers' compensation payments, the recipient company has "potential liability" created by the fact that the temporary agency may not be adequately covered.¹⁵⁷ Nevertheless, even when it is shown that the temporary agency is adequately covered under the Workers' Compensation Act, the courts still conclude that the recipient company has the right

sub-contractor

Id.

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* at 268-69.

¹⁵⁷ If the subcontractor is not adequately covered and the contractor becomes liable for the employee's workers' compensation, according to K.R.S. § 342.610, the contractor may sue the subcontractor for indemnity.

to immunity under K.R.S. § 342.690. It does not take long to see that, as compared to an employer who employs only regular employees, employers who utilize temporary employees may be at a great advantage. Assuming that the temporary employment agency in the example above has adequately covered its employees with workers' compensation,¹⁵⁸ the owner of the manufacturing plant is not only free from paying Employee number two any workers' compensation payments, but will also be immune from any common law causes of action Employee number two might have against him.

While this result may seem strange at first, a closer examination of the intent behind K.R.S. § 342.610(2) reveals a clearer picture. This statute was written specifically to address the workers' compensation issues that arise out of a typical contractor/subcontractor relationship. The statute's primary purpose was to provide contractors an incentive to deal with and hire subcontractors who were adequately covered with workers' compensation insurance.¹⁵⁹ Likewise, by placing primary responsibility to pay workers' compensation benefits solely on the subcontractor, the statute provided subcontractors with an incentive to maintain a safe working environment for their employees.

While this is a noble goal, its application to the atypical working relationship in which the temporary worker finds himself is somewhat strained, and its results are often illogical and fundamentally contrary to the purpose and spirit of the workers' compensation laws. Unlike the typical subcontractor, most temporary employment agencies are not present on site.¹⁶⁰ As a result, recipient companies are not in a position, physically, to maintain a safe working environment, ensure the "temp" is adequately instructed, or guard against abnormally dangerous job assignments.¹⁶¹ Thus, the intended incentives of K.R.S. § 342.610(2)

¹⁵⁸ In today's competitive market for temporary employees, it is unlikely that an agency will be found to not be adequately covered.

¹⁵⁹ See *Fireman's Fund Ins. Co. v. Sherman & Fletcher*, 705 S.W.2d 459, 461 (Ky. 1986) (stating that "[t]he purpose of the 461 provision of K.R.S. 342.610" providing "that a contractor is liable for compensation benefits if a subcontractor does not secure compensation benefits is to prevent subcontracting to irresponsible people").

¹⁶⁰ See McClure, *supra* note 17, at 16 (stating "[a]lthough technically the temporary agency must abide by the same rules as any other employer, the agency is not on the job site to monitor conditions").

¹⁶¹ In *Henderson v. Manpower of Guilford County*, 319 S.E.2d 690 (N.C. Ct. App. 1984), the court held that Manpower and the recipient company should be considered joint employers and therefore jointly liable for workers' compensation

are not properly effectuated. The temporary worker is engaged on the recipient company's premises. It is the recipient company who not only decides what kind of work the temporary employee will perform, but how that work should be performed. Moreover, because temporary workers are "only on the job for a few days, they do not know the [safety] rules, do not know whom to call about suspected infractions and are often desperate to have the job — and to keep getting jobs from the agency"¹⁶² For these reasons, "they are unlikely to report unsafe conditions."¹⁶³ On the other hand, the typical subcontractor, who knows he is primarily liable for workers' compensation, is present on the work site and is in a better position to guard against worker injuries.

In addition to the limited statutory incentives in K.R.S. § 342.610(2), recipient companies are, arguably, provided with adequate incentives to maintain safe working conditions for temporary employees. First, other provisions of the workers' compensation laws provide incentives that motivate the recipient company to maintain a safe working environment for its permanent employees. Consequently, because the temporary employees will be working in the same environment as these permanent employees, they will be adequately protected from unsafe working conditions.

This argument presupposes two facts: (1) all recipient companies employ some permanent workers; and (2) temporary employees work side by side with permanent employees. Both of these underlying assumptions are not always valid. First, although it would be nearly impossible to have a company of nothing but temporary workers, the percentage of employees that fall into the temporary category is growing at an

payments. The court observed that the recipient company was in a better position to guard against worker injury. Judge Phillips wrote, "the dominant purpose of the Workers' Compensation Act is to protect and compensate employees injured on their jobs, [so] employers in charge of jobs where work is actually done and injuries occur should not be absolved of liability" *Id.* at 694.

¹⁶² McClure, *supra* note 17, at 15-16 ("The Oil, Chemical and Atomic Workers union launched a campaign against the use of contract workers in their industry after finding that some of the worst chemical plant and refinery accidents involved the use of contract workers. Says the union's legal counsel, Greg Mooney, 'Part of the problem is that these workers don't receive the same training to handle emergencies as the regular union workers. And when an emergency happens, they're not able to even use the same language as the rest of the workforce — and that can be very deadly.'").

¹⁶³ *Id.*

incredible rate.¹⁶⁴ Presumably, the percentage of temporary employees at a typical recipient company will continue to grow as well. Obviously, as this percentage gets bigger, the first assumption becomes weaker. Second, there is no guarantee that work assignments given to temporary employees will place them side by side with the employer's permanent employees. The very fact that the temporary employee is needed suggests that there are job responsibilities that the recipient company either does not have the human resources to handle or refuses to assign to the permanent staff.¹⁶⁵

Another argument is that because the recipient company indirectly pays its temporary employees' workers' compensation premiums, via costs charged to it by the temporary employment agency, the recipient company is provided with an incentive, similar to that provided to subcontractors by K.R.S. § 342.690(2), to keep and maintain a safe workplace.¹⁶⁶ According to this reasoning, a recipient company will be careful to avoid subjecting temporary employees to dangerous conditions because if they are injured, the temporary agency's workers' compensation premiums will go up, and this cost will then be reflected in a higher price charged to the recipient company. This economic chain reaction provides an adequate check on the recipient company's efforts to provide for a safe work place.¹⁶⁷

This second argument, however, makes little sense when one realizes how temporary employment agencies pass on increased costs to recipient companies. When Employee number two is injured while working on recipient company X's premises, the temporary employment agency does not raise the price charged to X proportionately. Rather, this increase in costs is passed on to all customers of temporary employment agencies equally, thus minimizing the economic impact from heightened premium payments. Like a typical insurance scheme, this method of apportionment

¹⁶⁴ See *supra* notes 15-36.

¹⁶⁵ For example, "[o]ne temp interviewed by [the Carolina Alliance for Fair Employment] reported spending a day reaching into vats of caulking material with unprotected arms and hands and breathing in scorching vapor without any mask." McClure, *supra* note 17, at 15.

¹⁶⁶ See *Blacknall v. Westwood Corp.*, 747 P.2d 412 (Or. Ct. App. 1987), *aff'd*, 764 P.2d 554 (Or. 1988) (noting that recipient companies must either directly or indirectly pay workers' compensation premiums).

¹⁶⁷ See *Robinson v. Omark Indus.*, 611 P.2d 665, 670 (Or. Ct. App. 1980) (Thorton, J., dissenting) (opining that the majority's holding would force general employers to insure against all risks to protect against increased insurance premiums due to misuse of employee by special employer).

minimizes the costs associated with certain risk and may provide yet another incentive for recipient companies to take less seriously their responsibility for providing safe working conditions.

Given the nature of these realities, as well as the negligible amount of influence and physical control the recipient company has over the temporary employee, it seems clear that Kentucky's workers' compensation laws should provide recipient companies with adequate incentives to maintain a safe working environment for temporary employees.

CONCLUSION

As previously indicated, the use of temporary employees is growing at an incredible pace.¹⁶⁸ In Kentucky, precedent now mandates that state courts use K.R.S. §§ 342.610(2) and 342.690 to analyze the exclusivity issue in the context of the temporary employment relationship.¹⁶⁹ As made apparent by the Kentucky cases described above, under this statutory approach it would be difficult to imagine a situation involving a temporary employment relationship where a court could find that a temporary employee has retained his right to sue the recipient company. In other words, under Kentucky law, temporary employees almost always will be barred from bringing suit against the borrowing employer.¹⁷⁰ In light of the extreme variations that exist from one employee/employer

¹⁶⁸ See *supra* notes 15-36.

¹⁶⁹ See *supra* notes 37-137. Pursuant to recent amendments to Chapter 342, temporary employment agencies are now "deemed" the "employer" of their temporary workers. K.R.S. § 342.615(5) provides that "[a] temporary help service shall be deemed the employer of a temporary worker and shall be subject to the provisions of this chapter." While this new provision reflects the legislature's awareness of the inherent differences that exists between a contractor/subcontractor relationship on the one hand and a recipient company/temporary employee relationship on the other, its bright line rule is shortsighted at best. See *infra* note 171. By providing that temporary employment agencies are always the employer of their temporary employees, K.R.S. § 342.615(2) places legislative priority on the ease of administration rather than on ensuring the presence of adequate incentives upon recipient companies to provide a safe working environment.

¹⁷⁰ Arguably, under K.R.S. § 342.650(6), a temporary employee can elect not to be covered by the Workers' Compensation Act. Under such circumstances, the temporary employee would not be barred from bringing suit against the borrowing employer. However, as is the case with permanent employees, temporary employees often are unaware of the right afforded by K.R.S. § 342.650(6).

relationship to the next, such a bright-line rule is bad policy¹⁷¹ Moreover, using K.R.S. §§ 342.610 and 342.690 to analyze a relationship to which these statutes were not intended to apply has been cumbersome, overly technical, and inadequate to meet the needs and expectations of temporary employees. While these statutes serve important functions in regard to other more typical work settings, they simply are insufficient to fully address the new demands on the workplace created by the rise in temporary employment.

Massachusetts' G.L. ch. 152 §§ 15 and 18 provide a better alternative. Sections 15 and 18 reflect the Massachusetts legislature's awareness of the special concerns in a temporary employment relationship. Consequently, these statutes, in an effort to provide for the overall safety of temporary workers, effectively create needed incentives for recipient companies to act responsibly when dealing with temporary employment agencies and temporary employees.

¹⁷¹ At least one court has recognized the danger of "holding that a labor broker-customer relationship will always establish dual employer status as a matter of law." *Kidder v. Miller-Davis Co.*, 564 N.W.2d 872, 879 n.7 (Mich. 1997) (finding that such a holding would be contrary to the complex nature of the labor broker relationship, which should be evaluated on a case-by-case basis. The court emphasized that "each case turns on its own facts" and "the existence of a labor broker relationship in and of itself may not always be dispositive" of the rights at issue. *Id.*).

